Case No. S_____

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

DAWN HASSELL, *et al.*
Plaintiffs and Respondents,

vs.

AVA BIRD,
Defendant,

YELP INC.,
Appellant.

After a Decision by the Court of Appeal
First Appellate District, Division Four, Case No. A143233
Superior Court of the County of San Francisco
Case No. CGC-13-530525, The Honorable Ernest H. Goldsmith

PETITION FOR REVIEW

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I. ISSUES PRESENTED

1. This Court has recognized a narrow exception to the requirement that a non-party to litigation receive notice and an opportunity to be heard before an order is entered that may be applied to that non-party, limiting that exception to cases where the non-party is acting in concert with a party, or the party can only act through others (such as a union that can only act through its members).

Can that narrow exception be extended to a non-party without any factual findings to support that extension, thus allowing courts to deprive online publishers of notice and the right to be heard before infringing their First Amendment rights by ordering them to remove online content?

2. 47 U.S.C. § 230(c)(1) and (e)(3) prohibit courts from treating any "provider … of an interactive computer service … as the publisher or speaker of any information provided by another content provider," and, separately, from permitting a "cause of action [to] be brought" or "liability [to] be imposed" if it is "inconsistent with this section."

Despite Section 230's statutory immunity, may a court enjoin a website publisher and require it to remove third-party-created content from its website—and impose contempt citations and related liabilities that might flow from a failure to abide by such an injunction—merely because the plaintiff chose not to name the website publisher as a party in the litigation?

II. REASON REVIEW SHOULD BE GRANTED

Occasionally a legal principle adopted to prevent abuse gets transformed through misinterpretation into a weapon for abuse. When that happens in California, it falls to this Court to step in and correct such misuse. This is such a time.

In a published decision, the Court of Appeal for the First Appellate District, Division Four, affirmed an injunction, entered without notice or an opportunity to be heard, against Yelp. The injunction required Yelp—a non-party in the litigation—to remove reviews from its website Yelp.com (along with Yelp's related websites and mobile applications, referred to simply as "Yelp"). Without meaningful analysis, and dismissing Yelp's First Amendment right to control its website, the appellate court invoked a common law principle created to prevent parties from evading an injunction through gamesmanship (*i.e.*, by acting in collusion with non-parties). The court did not find, or even consider whether, Yelp had engaged in such conduct. The appellate Opinion contemplates contempt and sanctions proceedings against Yelp if it refuses to comply, although Yelp has no material connection to the enjoined party and engaged in no wrongful conduct.

This Court's review of the court of appeal's due process analysis is "necessary to secure uniformity of decision [and] to settle an important question of law"—whether non-parties are entitled to notice before being

subject to an injunction that infringes *their rights*, including, as here, fundamental First Amendment rights. Cal. R. Ct. 8.500(b)(1). The appellate Opinion drastically expands the narrow exception to due process invoked by the court, applying it to a novel factual scenario without any evidence that the exception should apply—and, indeed, expressly disclaiming the need for any evidence. Op. 21.

In effect—and without analyzing whether these cases should be extended to this very different factual scenario—the court turned a narrow exception into a general rule, which now allows courts across California to expressly name non-parties in injunctions without any factual findings of misconduct. *Cf.* Eric Goldman, *Yelp Forced to Remove Defamatory Reviews—Hassell v. Bird*, Tech. & Mark. Law Blog, June 8, 2016, available at http://blog.ericgoldman.org/archives/2016/06/yelp-forced-to-remove-defamatory-reviews-hassell-v-bird.htm ("*Goldman II*") ("I guess California courts have virtually unlimited discretion to apply injunctions to non-parties as they see fit?"). In doing so, the court rendered meaningless the careful guidelines California courts have adopted to limit the scope of this narrow exception, giving litigants nationwide an incentive to forum shop in California and a roadmap to circumvent due process rights here.

The court of appeal combined its unwarranted *expansion* of this limited common law principle, with an unprecedented *narrowing* of the protection provided by the Communications Decency Act, 47 U.S.C. § 230

("Section 230"), to deny Yelp the federal immunity it would have received if Hassell had sued it. Addressing this issue for the first time in California, the court exalted the form of the action—namely, the fact that Yelp was tactically not named as a party—over the substance of Section 230 and Congress' clear intent in enacting it to protect websites from actions that treat them as publishers or distributors of third-party content.

Section 230 immunity plays a vital role in the legal landscape that has allowed the Internet to flourish. As this Court noted a decade ago in its sole decision evaluating Section 230, "[t]he provisions of section 230(c)(1), conferring broad immunity on Internet intermediaries, are [] a strong demonstration of legislative commitment to the value of maintaining a free market for online expression." *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 56 ("*Barrett*"). In *Barrett*, this Court made clear that Section 230 immunizes website operators from actions by disgruntled businesses hoping to punish them for allowing third-party content—even defamatory content—to remain on their websites. *Id.* at 39-40. The court of appeal followed *Barrett* in name alone. Op. at 27. It narrowly interpreted Section 230 to give plaintiffs a means of directly punishing website publishers for displaying third party content. In doing so, it created a clear conflict between its holding and the broad interpretation of Section 230 that this Court recognized in *Barrett*.

The Section 230 ruling is particularly problematic because it is utterly inconsistent with the court's due process ruling. Section 230(c)(1) broadly mandates that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Yet here, the court affirmed an injunction imposed on Yelp by stretching due process law to conclude that Yelp was acting "*with* or *for*" Bird (Op. 30-31)—treating Yelp as standing in Bird's shoes solely based on Yelp's role as an online publisher of her alleged content. This contradiction injects confusion into each of these legal principles.

This Court's review in this matter is "necessary to secure uniformity of decision [and] to settle an important question of law"—should California courts continue to adhere to the broad interpretation of Section 230 that this Court approved in *Barrett*? Cal. R. Ct. 8.500(b)(1).

The impact of the court of appeal's due process and Section 230 decisions for the vitality of online speech is immense. Viewed only through the prism of review websites such as Yelp, this is a tremendously important issue because of the high value that easy access to consumer reviews offers to the general public. *E.g.*, *Edwards v. District of Columbia*, 755 F.3d 996, 1006 (D.C. Cir. 2014) ("[f]urther incentivizing a quality consumer experience are the numerous consumer review websites, like Yelp ..., which provide consumers a forum to rate the quality of their

experiences"). If Yelp and entities like it are denied their right to exercise editorial control in publishing consumer reviews—providing businesses an effective tool to remove critical commentary—consumers will suffer.

But the appellate decision reaches far beyond this single area, vast though it may be. A wide array of website publishers display third-party content, including political organizations, media entities, and repositories of creative content such as YouTube, to name only a few. Some of this content entertains or educates, while some simultaneously offends, and much of it walks a line between protected and unprotected speech. The value of such content lies in diversity, and websites benefit from offering these disparate views and opinions to their users.

This does not leave plaintiffs like Hassell without a remedy—although if it did it would not matter because Congress' intent controls. For twenty years, Congress has insisted that plaintiffs look to the content creator alone for a remedy, through tools such as judgment liens and contempt proceedings—post-judgment options that Hassell never pursued here. During those twenty years, no court has approved Hassell's stratagem of denying a website publisher its due process rights in order to tactically avoid the immunity Congress established through Section 230. The appellate court's blessing of the injunction entered against Yelp, following an *uncontested* hearing to prove up the default judgment against Bird

(A00213), is a loophole that future plaintiffs will exploit to escape Section 230's broad immunity.

Yelp and other websites will suffer as a result of this Opinion. But more importantly, members of the public that rely on the wealth of online third-party commentary—to aid decision-making on myriad issues like consumer purchases, politics, and employment— will be harmed as subjects of criticism follow Hassell's example: intentionally sue the commenter alone, perhaps in a manner that maximizes the chance that he or she will be unable or unwilling to defend the lawsuit regardless of its underlying merit, and then after a default judgment present the injunction to the website publisher as an unassailable *fait accompli*.

The issues presented in this case are unresolved in California. Together, the court of appeal's holdings threaten to undermine the validity and efficacy of the information available to consumers, and online speech generally. On each of these questions of first impression in California, the court of appeal reached the wrong result. Yelp requests, therefore, that this Court accept review and resolve the important issues presented.

III. STATEMENT OF FACTS AND PROCEDURE

A. Yelp's Website Publishes Tens of Millions Of Third-Party Consumer Reviews.

Yelp allows any member of the public to read and write online reviews about local businesses, government services, and other entities.

A00240. Yelp is available to the public at no charge and without any registration requirement. *Id.* Those who register by creating an account may write reviews about businesses and service providers, and thus contribute to a growing body of tens of millions of publicly-available consumer reviews. *Id.* Tens of millions of other users read the reviews on Yelp when making a wide range of consumer and other decisions. *Id.* The businesses listed on Yelp also can create free accounts, which allow them to publicly respond to any review, with such a response appearing next to the original review. *Id.* Reviewers on Yelp can remove their reviews at any time. A00841. As Yelp's website explains, it applies automated software to all reviews posted in an attempt to provide the most helpful reviews to consumers. A00519.

B. Hassell Obtains An Injunction Against Yelp Without Giving It Any Notice.

1. Third-Party Users Write Critical Reviews About Hassell Law Group On Yelp.

Hassell, a San Francisco attorney, owns The Hassell Law Group, P.C. A00006. According to Hassell's Complaint, Bird suffered a personal injury on June 16, 2012, and retained The Hassell Law Group. A00002-3. After a few months, Hassell ended the attorney-client relationship. *Id.* On January 28, 2013 a user with the screen name "Birdzeye B." posted a one-star review of The Hassell Law Group on Yelp, complaining about Hassell's legal services. A00018. Believing that "Birdzeye B." was Bird,

Hassell sent Bird an email that day, requesting she remove the "factual inaccuracies and defamatory remarks" from Yelp. A00005. Bird replied the next day, complaining about Hassell's representation. A00348.

2. Hassell Sues Bird And Obtains A Default Judgment, Which Includes An Injunction Against Yelp.

On April 10, 2013, Dawn Hassell individually, and the Hassell Law Group P.C., filed a complaint against Bird, but not Yelp, in San Francisco Superior Court. A00002. The suit asserted claims based on two allegedly defamatory reviews—one by Birdzeye B. and another by a reviewer identified as J.D. (A00004-5)[1]—and sought compensatory and punitive damages. It also sought injunctive relief against Bird only. A00013. Although the Birdzeye B. public account profile stated that its creator lived in Los Angeles (A00091), Bird was served through substitute service on the owner of the Oakland home in which Bird was injured, who told the process server that he had not seen Bird in months. A00026. On July 11, 2013, the court entered a default against Bird. A00023.

On November 1, 2013, Hassell filed a Summary of the Case in Support of Default Judgment and Request for Injunctive Relief. A00033-36. Hassell significantly expanded the relief being sought as described in the Complaint, adding another allegedly defamatory statement to her claim

[1] Hassell claimed that "J.D." was Bird based on the review's use of capitalization, despite the content being at odds with the original challenged statement. A00034, A00099.

(A00036, A00102)[2] and demanding for the first time that the court "make an order compelling Defendant and Yelp to *remove* the defamatory statements, including all entire posts, immediately. If for any reason Defendant does not remove them all by the Court-ordered deadline (which is likely given Defendant's refusal to answer the complaint), *the Court should order Yelp.com to remove all 3 of them*." A00051 (emphasis in original).

Plaintiffs' Request for Judgment went even further, seeking "an Order ordering Yelp.com to remove the reviews and subsequent comments of the reviewer within 7 business days of the date of the court's Order." A00051. Hassell intentionally did not serve her application for default judgment on Yelp or otherwise notify Yelp about it. A00243; *see also* A00837. The court granted the requested injunction, including the part directed to non-party Yelp. A00213. The court made no factual findings as to Yelp. *Id.*

C. The Trial Court Denies Yelp's Motion To Vacate The Injunction.

On January 28, 2014, Yelp's registered agent for service of process received by mail a letter enclosing a notice of entry of judgment or order and threatening Yelp with contempt proceedings if it did not comply with the order. A00537-547. On February 3, 2014, Yelp responded to Hassell

[2] She added another post from Birdzeye B. that primarily criticized the litigation. A00036, A00102.

by letter, stating that as a non-party which did not receive notice or an opportunity to be heard, Yelp was not bound by the terms of the Judgment. A00548-550. Yelp further explained that Section 230 precludes enforcement of the injunction, or liability as to Yelp. A00549. Hassell did not respond until April 30, 2014. She claimed that her office was "currently setting a motion to enforce the court's order against Yelp," but did not respond substantively to Yelp's position. A00551.

On May 23, 2014, Yelp moved to vacate the Judgment. A00225-470. Hassell opposed Yelp's Motion to Vacate. A00471-572. On September 29, 2014, the trial court denied Yelp's Motion. A00808. It quoted from *Ross v. Superior Court* (1977) 19 Cal.3d 899, 906 ("*Ross*"), and *Berger v. Superior Court* (1917) 175 Cal. 719, 721 ("*Berger*"), to hold that injunctions may run to non-parties who are aiding and abetting an enjoined person to violate an injunction, and concluded that Yelp fit within this exception to general due process requirements. A00808-809. It did not address Yelp's claim to immunity under Section 230.

D. The Court Of Appeal Affirms The Trial Court's Decision.

In a published decision, the court of appeal affirmed the trial court's conclusion that Yelp was bound by the injunction. Op. 1-2. As relevant here, the court characterized the order requiring Yelp to remove content from its website as a "removal order"—not an injunction (Op. 1)—and treated the "removal order" as if it were separate from the Judgment (*e.g.*,

Op. 10-11 (concluding that Yelp was not aggrieved by the default judgment, but was aggrieved by the removal order)).[3]

After evaluating Yelp's standing to appeal (issues not raised here), the appellate court rejected Yelp's argument that due process barred enforcement of the injunction against it. Op. 18-23. The court noted, first, that "An Injunction Can Run Against a Nonparty." Op. 18. Citing a handful of cases, the court concluded that "settled principles undermine Yelp's theory that the trial court was without any authority to include a provision in the Bird judgment which ordered Yelp to effectuate the injunction against Bird by deleting her defamatory reviews." Op. 19.

The appellate court did not discuss or apply any of the requirements that California courts have enunciated to justify extending an injunction to a non-party. Op. 19-21. Instead, it simply distinguished the cases Yelp cited, concluding that none presented facts similar to those presented here. *Id.* The court made clear that its decision did not turn on the facts of the case, and that the question of whether Yelp was "aiding and abetting" Bird's violation of the injunction "has no bearing on the question whether

[3] Some of the court's holdings seemed to grow out of this novel characterization of the injunction against Yelp, and its Opinion ultimately turned on its conclusion that Yelp was not subject to an injunction at all. *E.g.*, Op. 29 ("[a]gain though, the party that was enjoined from publishing content in this case was Bird, ….). But the "removal order" is a classic injunction and the court of appeal created uncertainty in the law by treating it as anything else. *E.g.*, *PV Little Italy, LLC v. MetroWork Condominium Ass'n* (2012) 210 Cal.App.4th 132, 143 n.5.

the trial court was without power to issue the removal order in the first instance." Op. 21.

The court next rejected Yelp's argument that the First Amendment protects its right to distribute Bird's speech. Op. 21-23. The court distinguished a U.S. Supreme Court case holding that book and magazine distributors are entitled to due process in connection with a seizure order. Op. 21-22, citing *Marcus v. Search Warrants* (1961) 367 U.S. 717 ("*Marcus*"). The court explained that "in this context, it appears to us that the removal order does not treat Yelp as a publisher of Bird's speech, but rather as the administrator of the forum that Bird utilized to publish her defamatory reviews." *Id.* The court also suggested that the issue was whether a *prior* hearing was required, and that this case differs from *Marcus* because here "specific speech has already been found to be defamatory in a judicial proceeding." Op. 23.

The court also rejected Yelp's argument that the injunction is an unconstitutional prior restraint. Op. 23-26. Expanding this Court's decision in *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141 ("*Balboa Island*"), the court held that "the trial court had the power to make the part of this order requiring Yelp to remove the [statements at issue] because the injunction prohibiting Bird from repeating those statements was issued following a determination at trial that those statements are defamatory." Op. 25.

Finally, the court held that Section 230 did not protect Yelp from Hassell's injunction. Op. 26-31. Its decision turned largely on the fact that Hassell intentionally chose not to sue Yelp, or even give it advance notice of her claims, which the court found "distinguish[ed] the present case from Yelp's authority, all cases in which causes of action or lawsuits against internet service providers were dismissed pursuant to section 230." Op. 28 (citations omitted); *see also id.* 29-30 (distinguishing cases barring actions for injunctive relief because in each the claim was asserted "against an Internet service provider defendant in a civil lawsuit"); *id.* 30-31 ("[i]f an injunction is itself a form of liability, that liability was imposed on Bird, not Yelp"). The court rejected each of Yelp's arguments. Op. 29-31.

Yelp did not file a petition for rehearing.

IV. REVIEW IS NECESSARY TO RESOLVE TWO QUESTIONS VITAL TO WEBSITES THAT PUBLISH THIRD-PARTY CONTENT

A. This Court Should Accept Review To Establish That Website Publishers Are Entitled To Notice And An Opportunity To Be Heard Before They Are Ordered To Remove Content.

The injunction here names Yelp—although it is not a party to this action—and specifically orders Yelp to remove content from its website. Invoking what it described as "settled principles" to reject Yelp's due process arguments, the court insisted that a non-party may be subject to an injunction if it is "acting in concert with the enjoined party and in support of its claims." Op. 19 (citations omitted).

But *none* of the cases the court cited touches on the issue presented here: whether a non-party to litigation has a right to challenge an order that *expressly names it* and affects *its own rights*—here, Yelp's right to maintain *critical* reviews on its website, often in conflict with the desires of businesses that disavow the criticism and aim to remove such commentary from public view.[4] And none allowed an injunction where the non-party has such a remote connection to the party enjoined. The only connection between Yelp and Bird is that Bird, like tens of millions of people, posts reviews on Yelp. The court's application of an exceedingly narrow exception to fundamental due process requirements grossly expanded that exception beyond its intent and purpose.

1. Due Process Requires Notice And An Opportunity To Be Heard Before Being Subject To An Order Affecting Rights.

The requirements of notice and hearing are firmly rooted in the United States and California Constitutions. As the court made clear in *Estate of Buchman* (1954) 123 Cal.App.2d 546, 559, "[t]he fundamental conception of a court of justice is condemnation only after notice and hearing." Thus, "[t]he power vested in a judge is to hear and determine, not

[4] If Yelp immediately removed every review a business owner claimed was false or even defamatory, it soon would have no critical reviews on its website. To maintain the integrity of its website—for the benefit of its users—Yelp must challenge claims such as Plaintiffs' claims here.

to determine without hearing," and the Constitution requires a fair hearing. *Id.* at 560; *see also People v. Ramirez* (1979) 25 Cal.3d 260, 263-64.

This Court long ago reaffirmed as a "seemingly self-evident proposition that a judgment *in personam* may not be entered against one not a party to the action." *Fazzi v. Peters* (1968) 68 Cal.2d 590, 591 ("*Fazzi*"). As the U.S. Supreme Court has held, courts "may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. N.L.R.B.* (1945) 324 U.S. 9, 13 ("*Regal Knitwear*").

Despite this settled constitutional principle, and without giving Yelp any notice, the trial court enjoined speech that Yelp displays and uses to provide an aggregate rating of the Hassell Law Group to consumers looking to hire lawyers. The court of appeal affirmed, declaring without analysis or supporting legal authority that the injunction "does not treat Yelp as a publisher of Bird's speech, but rather as the administrator of the forum that Bird utilized to publish her defamatory reviews." Op. 22. This faulty reasoning ignores Yelp's important role as an online publisher and its strong interest in developing and maintaining a trusted resource that provides helpful consumer reviews to the public, including critical reviews that dissatisfied clients post. Yelp and other online forums like it are not merely the "administrators" of their websites—they are publishers and

editors whose actions to disseminate speech are fully protected by the First Amendment and due process rights. Yelp, for example, has developed automated software designed to enhance users' experiences by showcasing more helpful content over potentially less helpful content (like fake or paid-for reviews). *E.g.*, A00519. And Yelp maintains terms of service and content guidelines that, when violated, lead to the removal of offending content. A00561.

To support its overreach, the court purported to distinguish *Marcus*, 367 U.S. 717, but it overlooked the fundamental point of *Marcus* and the many other cases that protect the right to distribute speech. Op. 22-23, citing *Marcus*; *Heller v. New York* (1973) 413 U.S. 483, 488. The U.S. Supreme Court recognized a First Amendment right to distribute speech, *separate* from the right to make the speech in the first instance, which cannot be infringed without notice and an opportunity to be heard. *See Marcus*, 367 U.S. at 731-732 (wholesale distributor of books and magazines had right to prompt hearing in connection with seized materials); *Heller*, 413 U.S. at 489-490 (seizure without a prior hearing is permissible only if adequate procedural safeguards are followed).

The court of appeal's invocation of *Heller*—which decided whether a party is entitled to an adversarial hearing *before* speech is seized—missed the point. Op. 23. Yelp did not receive *any* hearing; it had no opportunity to challenge the trial court's conclusion—reached *in an uncontested*

hearing following a default judgment—that the speech at issue was defamatory. Because Yelp has a separate First Amendment right to distribute speech, it was entitled to a hearing to oppose entry of the overbroad injunction that restrained speech on its website. *See Heller*, 413 U.S. at 489 ("because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint" (citations, internal quotes omitted; emphasis in original)). The fiction adopted by the court of appeal—inventing a role it coined "administrator of the forum," which apparently has none of the constitutional protections granted to publishers—to brush aside Yelp's clear interest in the integrity of its website led to an unprecedented travesty of justice here. With the court's approval this shocking new framework to deprive online publishers of due process and First Amendment rights can be repeatedly applied throughout California.

Hassell intentionally sought to abrogate Yelp's due process rights when she moved for a default judgment; as she put it she "anticipated that Defendant Bird would refuse to remove the Yelp review." A00482.[5] The court of appeal approved this gambit, holding that Yelp was not entitled to notice. As shown below, however, the line of cases it invoked does not

[5] Indeed, at the hearing on the motion to vacate, Hassell admitted that she did not name Yelp in her Complaint because Yelp is immune from suit under Section 230. A00837; *see* Section IV.B.1, *infra*.

support the broad abandonment of due process that occurred here. This Court should accept review to correct this incredible overreach, and ensure that the narrow exception to black letter due process requirements is appropriately limited.

2. The Court Of Appeal Grossly Diminished Fundamental Due Process Protections By Expanding A Narrow Rule Allowing Courts To Enjoin Aiders, Abettors, And Agents Of Parties.

The court of appeal rejected Yelp's due process argument, invoking what it characterized as "settled principles" of law that in limited circumstances allow an injunction to "run to classes of persons with or through whom the enjoined party may act." Op. 19. In doing so, the court invoked a narrow exception to the general due process requirement of notice and an opportunity to be heard, which allows an injunction to be *enforced* against a non-party who is *not named in the injunction* based on evidence showing that the enjoined party and the non-party acted together to evade the injunction, or the enjoined party and non-party have a close relationship such as union and member. Op. 19-21.

The appellate court distinguished Yelp's cases and held that these "settled principles" authorized an injunction that expressly applies to Yelp, without any evidence that Yelp engaged in the type of conduct, or had the type of relationship with the enjoined party, that California courts consistently have required to apply an injunction to a non-party. *Id.*

In reaching its strained conclusion, the appellate court stretched far beyond the original purpose of this common law doctrine. In *Regal Knitwear*, 324 U.S. at 14, the U.S. Supreme Court explained the very narrow purpose of this exception—that successors and assigns may be bound by an injunction if they are "instrumentalities through which defendant seeks to evade an order or [] come within the description of persons in active concert or participation with them in the violation of an injunction." The Supreme Court did not decide if the non-parties there could be held liable for violating the injunction, although it cautioned that it "depends on an appraisal of his relations and behavior and not upon mere construction of terms of the order." *Id.* at 15; *see also In re Lennon* (1897) 166 U.S. 548, 554-555 (injunction against railroad company could be enforced against one of its employees).

As one California court has explained, under the "common practice" of "mak[ing] the injunction run also to classes of persons *through whom the enjoined party may act*," "enjoined parties may not play jurisdictional shell games; they may not nullify an injunctive decree by carrying out prohibited acts with or through nonparties to the original proceeding." *People ex rel. Gwinn v. Kothari* (2000) 83 Cal.App.4th 759, 766-767 (reversing injunction against property owners that also would bind all future owners of the property) (citations omitted; emphasis added). This rule allows courts

to enjoin third parties who are acting at the behest and for the benefit of the third party, and not in pursuit of their own rights.

Yelp is aware of only one case presenting similar facts, and that court rejected the argument Hassell makes here. *Blockowicz v. Williams* (N.D. Ill. 2009) 675 F.Supp.2d 912, *aff'd* (7th Cir. 2010) 630 F.3d 563. There, the court refused to enforce an injunction as to a non-party website hosting defamatory content, explaining that the website operator's "only act, entering into a contract with the defendants, occurred long before the injunction was issued. Since the injunction was issued, [the website operator] has simply done nothing, and it has certainly not actively assisted the defendants in violating the injunction." *Id.* at 916.

In contrast, *none* of the cases the court of appeal invoked to support its holding enforced an injunction against a non-party on facts like those here. Op. 19. In most, the court refused to enforce an injunction against a non-party, finding that the relationship with the party was not close enough to justify the attempt, or remanding for further consideration of the *evidence* against the non-party. *Berger*, 175 Cal. at 719-720 (injunction against union and members could not be enforced against non-union member); *Planned Parenthood Golden Gate v. Garibaldi* (2003) 107 Cal.App.4th 345, 353 (refusing to enforce injunction against abortion protestors neither named individually or as class members); *People v. Conrad* (1997) 55 Cal.App.4th 896, 903-904 (injunction against anti-

abortion group could not be applied to separate group); *In re Berry* (1968) 68 Cal.2d 137, 155-156 (reversing injunction related to union activity because it enjoined persons acting "in concert among themselves").

The court of appeal cited only one decision affirming enforcement of an injunction against a non-party. Op. 19, citing *Ross*, 19 Cal.3d at 905.[6] In *Ross*, this Court held that an injunction against a state agency could be enforced against county agencies that served as agents in administering the program at issue. But that holding turned on the relationship between the state and county agencies. *Id.* at 907-908. The Court explained that because the state agency "could comply with the provisions of the … order … only through the actions of county welfare departments, it is clear that such counties could not disobey the order with impunity." *Id.* at 909. Here, in contrast, Bird herself could comply with the injunction at any time by removing the review from Yelp; no cooperation by Yelp is required to effectuate the injunction against Bird. A00841. And needless to say, Yelp is not Bird's agent.

The court of appeal's opinion skews this line of cases, drastically expanding them beyond their original intent, in three fundamental ways. *First*, in none of the cases cited—and indeed, no case known to Yelp—did

[6] In addition, the court separately rejected Yelp's reliance on *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1125, in which this Court affirmed a gang injunction against non-parties because "the gang itself, acting through its membership, [] was responsible for creating and maintaining the public nuisance" at issue.

the court approve an injunction that required a specifically-named non-party to act, or not act, as ordered. Each evaluated application of an injunction to a non-party not explicitly named. *E.g.*, *In re Berry*, 68 Cal.2d at 155-156 (strikers, who were not members of enjoined union); *Planned Parenthood*, 107 Cal. App. 4th at 350-351 (abortion protestors). In explicitly directing the injunction to Yelp, the court treated Yelp as if it had been present in the case all along with full opportunity to stand up for its rights as a publisher, ignoring the reality that Hassell intentionally prevented Yelp from learning about the application for the injunction in the first place. The appellate court's decision does not even mention the fact that the court was applying these cases to a completely different set of facts, or contemplate the implications of its decision to apply this line of cases to the different facts presented here. Its perfunctory analysis led to the wrong result.

Second, the court made clear that it did not base its decision on any conduct by Yelp, explaining that the question of whether Yelp aided and abetted Bird's alleged violation of the injunction was "potentially improper" and "has no bearing on the question whether the trial court was without power to issue the [injunction] in the first instance." Op. 21. Thus, the court affirmed the injunction against Yelp without *any* evidence that Yelp engaged in the type of conduct that courts—including this Court—consistently require to justify applying an injunction to a non-party

allegedly colluding with the enjoined party. Op. 19; *e.g.*, *Regal Knitwear*, 324 U.S. at 16 (a decision to enjoin a specific party as a successor or assign would require "a judicial hearing, in which their operation could be determined on a concrete set of facts"); *see also id.* at 15 ("whether a nonparty is bound 'depends on an appraisal of his relations and behavior'"). Here, there was no appraisal of Yelp's behavior or conduct before Yelp was explicitly named in the injunction. A00211.

No prior case has gone so far.[7] Moreover, the court reached its decision without any analysis or appreciation of *how* its unfettered expansion of this formerly narrow exception to due process will affect websites like Yelp, which publish content authored by tens of millions of third parties, but which have no other relationships with those third parties that justify being treated as their agents.

Third, the court ignored Yelp's real interests in its own website—permitting California courts to view a non-party's conduct solely through the lens of a plaintiff's unopposed characterizations of the defendant's alleged conduct, without regard to the separate interests of the non-party (here Yelp, a publisher) in the conduct or speech being enjoined. The court rejected the cases Yelp cited solely because they involved money

[7] *See, e.g., This Would Make Me Yelp!*, 111 North Hill Street, A Blog of California Civil Procedure, July 10, 2016, available at http://caccp.blogspot.com/2016/07/this-would-make-me-yelp.html?m=1 ("this one really manages to go off the rails").

judgments. Op. 20-21, citing *Fazzi*, 68 Cal.2d 590; *Tokio Marine & Fire Ins. Corp. v. W. Pac. Roofing Corp.* (1999) 75 Cal.App.4th 110. The appellate court did not explain why Yelp should receive less protection against a prior restraint—which this Court has described as "one of the most extraordinary remedies known to our jurisprudence [which] carr[ies] a heavy burden against constitutional validity" (*People v. Lucas* (2014) 60 Cal.4th 153, 261, *disapproved on other grounds, People v. Romero* (2015) 62 Cal.4th 1; citation omitted)—than it would against a mere money judgment.

The court invoked *Balboa Island* to support its decision but this too was an unwarranted expansion of existing law. In *Balboa Island*, this Court held that a court may enjoin the repetition of a statement found to be defamatory at a contested trial. 40 Cal.4th at 1158. The court approved the injunction in part, although it also found part to be invalid because it applied to the defendant and "all other persons in active concert and participation with her," but no evidence in the record supported a finding that anyone else made defamatory statements. *Id.* at 1160. Here, unlike in *Balboa Island*, the court approved a prior restraint (i) against a non-party that had no notice or opportunity to oppose the injunction (ii) following a default judgment, not a contested trial, (iii) based on an Order that did not evaluate any of the individual statements to determine if they are false, defamatory, and unprivileged. A00211. *Cf. Barrett*, 40 Cal.4th at 57

("[d]efamation law is complex, requiring consideration of multiple factors"). *Balboa Island* does not support the prior restraint entered against Yelp here.

As discussed below, the court's refusal to acknowledge Yelp's interests in its own website led to the second issue raised for review—the court's rejection of the statutory immunity that Section 230 guarantees Yelp and others that provide forums for third-party content.

B. This Court Should Accept Review To Make Clear That Section 230 Bars Injunctions Against Website Publishers Related To Third-Party Content.

This Court also should review—and reverse—the appellate court's conclusion that Section 230 of the Communications Decency Act does not apply to an injunction entered against a non-party. Op. 28. According to a noted commentator, this is the worst recent Section 230 decision, and "opens up holes that everyone—users and non-users alike—can abuse." *See Goldman II*, *supra* ("I can't stress enough how terrible this opinion is, and how much danger it poses to Section 230.").[8]

[8] As Prof. Goldman proclaimed the same day the appellate court issued its decision, "[i]t's been a tough year for Section 230." Eric Goldman, *WTF Is Going On With Section 230? – Cross v. Facebook*, Technology & Marketing Law Blog, June 7, 2016, available at http://blog.ericgoldman.org/archives/2016/06/wtf-is-going-on-with-section-230-cross-v-facebook.htm. In response to the decision here, Prof. Goldman declared that "[t]oday's opinion is worse than *all* of the cases I discussed yesterday—and you better believe I don't make that statement lightly!" *Goldman II*, *supra; see also California Appellate Court Decision Forces Yelp to Remove Defamatory Review*, Defamation Removal Law, available

California's courts of appeal have been increasingly inconsistent in their application of Section 230. In the past decade, most courts have routinely followed this Court's mandate in *Barrett* to broadly construe Section 230 immunity. *E.g.*, *Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 563 (rejecting claims against Internet social networking site brought by teenagers who were sexually assaulted by adults they met through site). Recently, though, the First District Court of Appeal has narrowly construed the statute to avoid immunity even where the statute applies under its plain language. *Hardin v. PDX, Inc.* (2014) 227 Cal.App.4th 159, 170 (misconstruing plaintiff's claims to hold that Section 230 did not immunize software provider that court incorrectly characterized as "participat[ing] in creating or altering content").

Yelp submits, respectfully, that this case presents the perfect opportunity for this Court to reconfirm the scope of Section 230 that Congress intended and appellate courts nationwide have repeatedly recognized. As it did a decade ago, this Court should make clear that California courts must abide by Section 230's grant of immunity to website

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at http://www.defamationremovallaw.com/2016/07/14/california-appellate-court-decision-forces-yelp-remove-defamatory-review/ ("[t]he case is significant and represents a departure from current legal precedent because Yelp was never a party to the lawsuit, and typically most courts would have found the judgment unenforceable. The ruling marks yet another blow in recent cases that have begun to chip away at the protections provided to websites like Yelp by Section 230 ….").

operators like Yelp, which protects them from *all* court orders designed to restrict the information they publish on their websites.

1. Congress Enacted Section 230 To Protect Website Publishers From Claims Like Those Asserted Here.

The Internet has effected one of the greatest expansions of free speech and communications in history. This is no accident. In 1996, to promote the free flow of information on the Internet, Congress resolved to protect websites and other online providers from liability for their users' content. Section 230 embodies that command, prohibiting courts from treating such a provider as the "publisher or speaker" of third-party content. 47 U.S.C. § 230(c)(1). Grounded in core First Amendment principles, Section 230 offers strong protection for innovation and expansion of free speech on the Internet. Since its enactment, federal and state courts have interpreted it to provide a "robust" immunity to companies that operate websites, such as Yelp, "from liability for publishing false or defamatory material so long as the information was provided by another party." *Carafano v. Metrosplash.com Inc.* (9th Cir. 2003) 339 F.3d 1119, 1122-23. In *Barrett*, this Court affirmed that the statute's "blanket immunity" extends to "those who intentionally redistribute defamatory statements on the internet." 40 Cal.4th at 62-63.

The Act provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any

information provided by another information content provider," and separately precludes imposition of any liability under state law inconsistent with its protections. 47 U.S.C. § 230(c)(1) & (e)(3). Under Section 230, a website operator like Yelp is immune from claims if (1) it is a "provider or user of an interactive computer service" (which all websites are); (2) the action seeks to punish it as a "publisher or speaker"; and (3) the action is based on "information provided by another information content provider." *Id.* As shown below, Section 230 bars the injunction against Yelp, as well as any liability for failing to comply. The appellate court's decision to the contrary creates a gaping hole in Section 230 immunity that inevitably will be exploited to pursue the very actions Congress intended to bar.[9]

2. The Court Of Appeal's Superficial Analysis And Failure To Follow Section 230's Plain Terms Create Tremendous Uncertainty in California As To The Scope Of Immunity Under The CDA.

The court of appeal held that the injunction "does not violate section 230 because it does not impose any liability on Yelp," elaborating that "Hassell filed their complaint against Bird, not Yelp; obtained a default

[9] This is no empty prognostication. Innovative attorneys are seeking ways to obtain court orders for use in reputation management. *E.g.*, *The Latest In Reputation Management: Bogus Defamation Suits From Bogus Companies Against Bogus Defendants*, Mar. 22, 2016, available at https://www.techdirt.com/articles/20160322/10260033981/latest-reputation-management-bogus-defamation-suits-bogus-companies-against-bogus-defendants.shtml; *One Injunction To Censor Them All: Doe Injunctions Threaten Speech Online*, June 1, 2016, available at http://www.knightfoundation.org/blogs/knightblog/2016/6/1/one-injunction-censor-them-all-doe-injunctions-threaten-speech-online/.

judgment against Bird, not Yelp; and was awarded damages and injunctive relief against Bird, not Yelp." Op. 28.

The court invoked the unique procedural posture of this case—the result of Hassell's intentional decision to deny Yelp the opportunity to defend itself—explaining that "[n]either party cite[d] any authority that applies section 230 to restrict a court from directing an Internet service provider to comply with a judgment which enjoins the originator of defamatory statements posted on the service provider's Web site." *Id.* This circular reasoning only rewards Hassell's disdain for due process.

The court's decision is flatly contrary to other California decisions (as well as the many decisions of other courts that have considered and consistently applied Section 230). For example, in *Kathleen R. v. City of Liverpool* (2001) 87 Cal.App.4th 684, the court held that Section 230 precludes claims for injunctive relief, explaining that "by its plain language, § 230[(c)(1)] creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Id.* at 692, 697-698 (citation, internal quotes omitted). Thus, plaintiff's equitable claims "contravene[d] section 230's stated purpose of promoting unfettered development of the Internet no less than her damage claims." *Id.*[10]; *see also Gentry v. eBay, Inc.* (2002) 99

[10] *See, e.g.*, *Noah v. AOL Time Warner, Inc.* (E.D. Va. 2003) 261 F.Supp.2d 532, 540, *aff'd*, 2004 WL 602711 (4th Cir. 2004) ("given that

Cal.App.4th 816, 831 ("If by imposing liability … we ultimately hold eBay responsible for content originating from other parties, we would be treating it as the publisher, *viz.*, the original communicator, contrary to Congress's expressed intent …" (citations omitted)); *Doe II v. MySpace*, 175 Cal.App.4th at 563, 572-573 (rejecting claims against Internet social networking site based on failure to adopt safety measures to protect against sexual predators; "[a]t its core, appellants want MySpace to regulate what appears on its Web site" and "[t]hat type of activity—to restrict or make available certain material—is expressly covered by section 230").

The court of appeal drastically departed from these rulings by misreading subsection (e)(3) of Section 230 and treating it as a limitation on the broad immunity established by subsection (c)(1). The court held that Section 230 did not apply to the prior restraint it imposed on Yelp "because [the court did] not impose any liability on Yelp, either as a speaker or a publisher of third party speech." Op. at 29. But Yelp is named in the injunction *only* for its role as publisher of the third-party reviews at issue, a straightforward contradiction of subsection (c)(1)'s prohibition on treating Yelp as the speaker or publisher of third-party content on its website. Subsection (e)(3) does not alter the broad immunity provided by subsection (c)(1), as the court of appeal implicitly held. It merely affirms the ability of

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the purpose of § 230 is to shield service providers from legal responsibility for the statements of third parties, § 230 should not be read to permit claims that request only injunctive relief").

state courts to entertain state law claims that are "consistent" with Section 230, while making clear that "inconsistent" state law claims and liability are barred.[11] The court of appeal's decision to treat subsection (e)(3) as establishing the scope of immunity undermines the broad protection that Congress intended for online publishers like Yelp.

At bottom, the court's conclusion that "[i]f an injunction is itself a form of liability, that liability was imposed on Bird, not Yelp" (Op. at 30)—relying on the fiction that the injunction against Yelp was not actually an injunction against Yelp (*see* footnote 3, *supra*)—exposes another fundamental flaw in its decision. The court of appeal reached its result *only* by violating subsection (c)(1) and treating Yelp as if it was the author (or "speaker") of the reviews at issue. It held that Yelp could be enjoined, without notice or an opportunity to be heard, under a limited legal principle that allows courts to extend injunctions to non-parties *who act on behalf of parties* in violating the injunction, because Yelp purportedly was acting "*with* or *for*" Bird *as the publisher of the statements at issue*. Op. 30-31, citing *Conrad*, 55 Cal.App.4th at 903; *see* Section A.2, *supra*. This is, at its core, treating Yelp as if it, rather than simply Bird, published the allegedly defamatory content. The court of appeal's due process and Section 230

[11] If section (e) encapsulated Section 230 immunity, then Section 230 would not bar federal civil claims. Plainly, that is not the case. *E.g.*, *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.* (N.D. Cal. Nov. 13, 2015) 144 F.Supp.3d 1088 (Section 230 barred federal and state claims).

holdings are fundamentally at odds with each other, resulting in a confusing and contradictory interpretation of each of these legal principles.

"An action to force a website to remove content on the sole basis that the content is defamatory is necessarily treating the website as a publisher, and is therefore inconsistent with section 230." *Medytox Solutions, Inc. v. Investorshub.com, Inc.*, 152 So.3d 727, 731 (Fla. Dist. Ct. App., 2014) (dismissing plaintiffs' claim for injunctive relief). Thus, "plaintiffs who contend they were defamed in an Internet posting may *only seek recovery from the original source of the statement*" (*Barrett*, 40 Cal.4th at 40 (emphasis added)), because "Congress has decided that the parties to be punished and deterred are not the internet service providers but rather are those who created and posted the illegal material" (*M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC* (E.D. Mo. 2011) 809 F.Supp.2d 1041, 1055). The court of appeal's holding flies in the face of these and other cases barring claims against website publishers.

Nor is it relevant that many cases applying Section 230 to defamation claims involve "allegations of defamatory conduct by a third party, and not a judicial determination that defamatory statements had, in fact, been made by such third party on the Internet service provider's website." Op. 30. This case was able to proceed to a default judgment only because one of Hassell's targets—the one that had the financial wherewithal to defend against her demand for an injunction—was

purposefully not named as a party or served with process in the case, and therefore could not prevent a result that is plainly barred by Section 230. In any event, the court's reasoning ignores the language of the CDA, which *assumes* that the statements are actually defamatory, but provides immunity regardless. *See also Barrett*, 40 Cal.4th at 39-40. This is a distinction without a difference, which only serves to inject confusion and ambiguity into Section 230 jurisprudence.

As Hassell admits, there is "vibrant, extensive national jurisprudence on section 230." Respondents' Appeal Brief ("R.A.B.") at 43. Yet, Hassell did not cite a *single case* to support her proposition that the CDA allows interactive computer services to be subject to injunctions to remove third-party content so long as they are not named in an action. Not a single court in any jurisdiction, state or federal, has so held—which is not surprising, given that Section 230(c)(1) flatly prohibits such a result, and plaintiffs typically satisfy the basic due process requirements that should have protected Yelp here.

This Court's admonition a decade ago in *Barrett* applies just as forcefully here. "The Court of Appeal gave insufficient consideration to the burden its rule would impose on Internet speech. … Congress sought to 'promote the continued development of the Internet and other interactive computer services'" by granting broad immunity to "Internet intermediaries" such as Yelp. 40 Cal.4th at 56 (citations omitted; emphasis

added). California should not break new ground to embrace such a skewed interpretation of Section 230—and invite the many lawsuits that will be filed here by forum shopping plaintiffs eager to force websites to remove critical content (contrary to this Court's warning in *Barrett*, 40 Cal.4th at 58). This case requires a careful analysis of Section 230's language and purpose. That analysis simply did not occur here, leading to the patently incorrect interpretation of Section 230 that the court of appeal adopted.

V. CONCLUSION

For all of the foregoing reasons, Yelp respectfully requests that the Court grant its Petition for Review and, on review, reverse the orders of the trial court and appellate court, and direct those courts to enter an order granting Yelp's Motion to Vacate the Judgment.

Dated: July 18, 2016

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court 8.504(d))

The text of this brief consists of 8,396 words as counted by the Microsoft Word word-processing program used to generate this brief, including footnotes but excluding the tables, the cover information required under rule 8.204(b)(10), the court of appeal opinion, this certificate, and the signature block.

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CERTIFIED FOR PUBLICATION

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DAWN HASSELL et al.,

Plaintiffs and Respondents,

v.

AVA BIRD,

Defendant;

YELP, INC.,

Appellant.

A143233

(San Francisco City & County Super. Ct. No. CGC-13-530525)

I.
INTRODUCTION

Respondents Dawn Hassell and the Hassell Law Group (Hassell)[1] obtained a judgment holding defendant Ava Bird liable for defamation and requiring her to remove defamatory reviews she posted about Hassell on Yelp.com, a Web site owned by appellant Yelp, Inc. (Yelp). The judgment also contains an order requiring Yelp to remove Bird's defamatory reviews from its Web site (the removal order). Yelp, who was not a party in the defamation action, filed a motion to vacate the judgment which the trial court denied.

On appeal, the parties raise numerous issues relating to the judgment against Bird, and the subsequent removal order. As to those issues, we conclude as follows: (1) Yelp is not "aggrieved" by the defamation judgment entered against Bird, but it is "aggrieved"

[1] Generally, we will refer to respondents collectively, using the singular, gender neutral pronoun form where appropriate.

by the removal order; (2) Yelp's trial court motion to vacate was not cognizable under Code of Civil Procedure section 663[2]; (3) Yelp has standing to challenge the validity of the removal order as an "aggrieved party," having brought a nonstatutory motion to vacate that order; (4) Yelp's due process rights were not violated because of its lack of prior notice and a hearing on the removal order request; (5) the removal order does not violate Yelp's First Amendment rights to the extent that it requires Yelp to remove Bird's defamatory reviews; (6) to the extent it purports to cover statements other than Bird's defamatory reviews, the removal order is an overbroad unconstitutional prior restraint on speech; and (7) Yelp's immunity from suit under the Communications Decency Act of 1996 (the CDA), 47 United States Code section 230, does not extend to the removal order.

Therefore, although we affirm the order denying Yelp's motion to vacate the judgment, we will remand this case so that the trial court can narrow the terms of the removal order in a manner consistent with this decision.

II.

STATEMENT OF FACTS

A. *The Complaint*

Hassell's April 2013 complaint against Bird arose out of Hassell's legal representation of Bird for a brief period during the summer of 2012. The complaint alleged the following facts about that representation: Bird met with Hassell in July to discuss a personal injury she had recently sustained. On August 20, Bird signed an attorney-client fee agreement. However, on September 13, 2012, Hassell withdrew from representing Bird because they had trouble communicating with her and she expressed dissatisfaction with them. During the 25 days that Hassell represented Bird, Hassell had at least two communications with Allstate Insurance Company about Bird's injury claim and notified Bird about those communications via e-mail. Hassell also had dozens of

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[2] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

direct communications with Bird by e-mail and phone and at least one in-person meeting. When legal representation was withdrawn, Bird had 21 months before the expiration of the statute of limitations on her personal injury claim, and had not lost any rights or claims relating to her injury.

Hassell further alleged that, on January 28, 2013, Bird published a review on Yelp.com about her experience with Hassell (the January 2013 review). Hassell attempted to contact Bird by phone to discuss the publication, but she failed to return the call, so the firm sent her an e-mail "requesting she remove the factual inaccuracies and defamatory remarks from her Yelp.com written statement." In an e-mail response, Bird made derogatory comments about Dawn Hassell's legal skills, refused to remove the January 2013 review, and threatened to post an updated review and to have another review posted by someone else.

According to the complaint, on February 6, 2013, Bird or her agent created a "fake Yelp identity, using the pseudonym 'J.D.,' from Alameda," to post another negative review about the Hassell firm on Yelp.com (the February 2013 review). Hassell believed that Bird was "J.D." because Hassell never represented a client with the initials J.D., and because the February 2013 review was posted shortly after the January 2013 review and used similar language.

In their complaint, Hassell alleged causes of action against Bird for defamation, trade libel, false light invasion of privacy, and intentional infliction of emotional distress. In a fifth cause of action for injunctive relief, Hassell alleged that Bird's ongoing wrongful acts were the direct and proximate cause of substantial pecuniary losses and irreparable injury to Hassell's business reputation and good will, and that they were entitled to an injunction because there was no adequate remedy at law to compensate them for their continuing injuries.

In their prayer for judgment, Hassell sought general and special damages, each in excess of $25,000, according to proof, and punitive damages in an unspecified amount. Hassell also prayed for "injunctive relief prohibiting Defendant Ava Bird from continuing to defame plaintiffs as complained of herein, and requiring Defendant Ava

Bird to remove each and every defamatory review published by her about plaintiffs, from Yelp.com and from anywhere else they appear on the internet."

B. *Yelp Reviews about Hassell*

The allegedly defamatory statements about Hassell that were posted on Yelp.com were attached as exhibits to the Hassell complaint.

The January 2013 review was posted by a reviewer who used the name "Birdzeye B. Los Angeles, CA." It was identified by Yelp as one of "10 reviews for The Hassell Law Group" that Yelp used to give Hassell an overall star rating of four and one-half out of five stars. Birdzeye B., however, gave Hassell a rating of one out of five stars, and stated that the law firm did not even deserve that. The reviewer's critique was directed at both the Hassell firm and Dawn Hassell personally, who was accused of "ma[king] a bad situation worse for me," and reneging on her obligations because "her mom had a broken leg" and because "the insurance company was too much for her to handle." The review also stated: "the hassell law group didn[']t ever speak with the insurance company either, neglecting their said responsibilities and not living up to their own legal contract! nor did they bother to communicate with me, the client or the insurance company AT ALL . . . ."

The February 2013 review was posted by a reviewer who used the name "J.D. Alameda, CA." It was identified by Yelp as one of "11 Filtered Reviews for The Hassell Law Group." Yelp posted a note advising its users that filtered reviews "are not factored into the business's overall star rating." The user who posted the February 2013 review gave Hassell a one star rating and provided the following information: "Did not like the fact that they charged me their client to make COPIES, send out FAXES, POSTAGE, AND FOR MAKING PHONE CALLS about my case!!! Isn't that your job. That's just ridiculous!!! They Deducted all those expenses out of my settlement." (Original capitalization.)

C. *The Default Judgment*

On April 17, 2013, Hassell served Bird by substitute service with a summons, the complaint, an alternative resolution package, a civil case information sheet, a statement of damages and an attorney letter. On June 18, 2013, Hassell filed a request for the

superior court clerk to enter a default against Bird, who had failed to answer Hassell's complaint. Default was entered and filed on July 11, 2013.

On November 1, 2013, Hassell filed a notice of hearing on their application for default judgment and request for injunctive relief. The application was supported by a "plaintiffs' summary of the case," which provided additional details about matters alleged in the complaint, and also described a third review that Bird allegedly posted on Yelp.com on April 29, 2013 (the April 2013 review).

Hassell's case summary also argued the merits of its case. In support of its request for injunctive relief, Hassell argued that "once the trier of fact has determined [Bird] made defamatory statements," the court would have authority to issue an injunction, and that if the same showing could be made at a prove-up hearing, a comparable injunction would be proper. Hassell reasoned that denying injunctive relief after a default prove-up hearing would mean a plaintiff can be forced to suffer defamatory harm so long as the defendant refuses to answer the complaint. Hassell requested that the injunction contain a provision requiring Yelp to remove the defamatory reviews in the event that Bird failed to do so, which was likely in light of her history of "flaunting" California's court system.

Through declarations from Dawn Hassell and another Hassell attorney named Andrew Haling, Hassell filed extensive documentary evidence, including Bird's attorney-client agreement, correspondence between Hassell and Bird, evidence of damages, and comments about Hassell that were posted on Yelp.com., including the April 2013 review that Hassell identified in its case summary as another defamatory statement by Bird.

The April 2013 review was posted by "Birdseye B. Los Angeles, CA, and was identified by Yelp as one of "11 reviews for The Hassell Law Group" that Yelp used to calculate Hassell's overall star rating. The reviewer described his or her statements as an update to Birdseye B.'s earlier review and then stated that Dawn Hassell had filed a lawsuit "against me over this review," and that she "tried to threaten, bully, intimidate, [and] harass me into removing the review!" Birdseye B. also stated: "the staff at YELP has stepped up and is defending my right to post a review. once again, thanks YELP! . . ."

On January 14, 2014, a default prove-up hearing was held before the Honorable Donald Sullivan. Although a transcript of that hearing is not in the appellate record, the court's minute order reflects that Dawn Hassell and Andrew Haling appeared on behalf of Hassell and there was no appearance by Bird. Dawn Hassell was sworn and testified, and, after considering all the evidence, the court entered judgment against Bird. Hassell was awarded general and special damages and costs totaling $557,918.75, but was denied punitive damages. The Bird judgment also awarded Hassell injunctive relief pursuant to the following provisions:

"Plaintiffs' Request for Injunctive Relief is Granted. Defendant AVA BIRD is ordered to remove each and every defamatory review published or caused to be published by her about plaintiffs HASSELL LAW GROUP and DAWN HASSELL from [Y]elp.com and from anywhere else they appear on the internet within 5 business days of the date of the court's order.

"Defendant AVA BIRD, her agents, officers, employees or representatives, or anyone acting on her behalf, are further enjoined from publishing or causing to be published any written reviews, commentary, or descriptions of DAWN HASSELL or the HASSELL LAW GROUP on Yelp.com or any other internet location or website.

"Yelp.com is ordered to remove all reviews posted by AVA BIRD under user names 'Birdzeye B.' and 'J.D.' attached hereto as Exhibit A *and any subsequent comments of these reviewers* within 7 business days of the date of the court's order." (Italics added.)

On January 15, 2014, Hassell served Bird with notice of entry of judgment. Bird did not appeal, and the judgment became final on March 16, 2014. (Cal. Rules of Court, rule 8.104.)[3]

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[3] A " ' "default judgment conclusively establishes, between the parties so far as subsequent proceedings on a different cause of action are concerned, the truth of all material allegations contained in the complaint in the first action, and every fact necessary to uphold the default judgment." ' [Citations.]" (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 149.)

D. ***Hassell's Efforts to Enforce the Judgment***

On January 15, 2014, Hassell hand-delivered a copy of the Bird judgment to an attorney employed by Yelp named Laurence Wilson, along with a letter requesting that Yelp comply with the judgment. On January 28, Hassell caused the judgment to be personally served on Yelp's national registered agent for service of process. In a letter served with the judgment, Dawn Hassell highlighted the following circumstances: Yelp had failed to comply with the court deadline for removing Bird's defamatory reviews; Laurence Wilson had not replied to Dawn Hassell's January 15 letter or returned phone calls from Hassell; and "Yelp, Inc.'s non-compliance with the court's order will become the subject of contempt proceedings and a further lawsuit against Yelp if Yelp refuses to comply [with the judgment] as my business is being further damaged."

Yelp's senior director of litigation, Aaron Schur, responded to Dawn Hassell in a February 3, 2014 letter. Schur stated that Yelp objected to the judgment "to the extent directed at Yelp itself" for three reasons: (1) Yelp was a nonparty to the litigation; (2) Yelp was immune from liability for it publication of a review; and (3) Hassell failed to properly serve Bird or prove its defamation claims against her. Schur also informed Hassell that Yelp had made the decision not to comply with the judgment, stating: "the judgment and order are rife with deficiencies and Yelp sees no reason at this time to remove the reviews at issue. Of course, Yelp has no desire to display defamatory content on its site, but defamation must first be proven." Schur stated that Yelp would "revisit its decision" if it was presented with stronger evidence. He also warned that Hassell's "threats" of litigation against Yelp were not well taken because Yelp would file a motion to dismiss and recover attorney fees under the anti-SLAPP law, "as it has done in the past in similar cases."

In an April 30, 2014 letter to Schur, Dawn Hassell asked that Yelp reconsider its position in light of the facts that Bird had refused to comply with the judgment, and, as a practical matter, she was judgment proof because the award against her was uncollectable. Dawn Hassell also objected to a recent decision by Yelp to recommend one of Bird's defamatory reviews. As Hassell explained, "I also take issue with the fact

that Yelp has now highlighted these defamatory reviews by user 'Birdzeye B.' (already confirmed to be Defendant Bird) by listing them as 'Recommended Reviews,' so other Yelp visitors see these defamatory reviews first, above more recent, honest, positive reviews."

Finally, Dawn Hassell advised Schur of her plan to file a motion to enforce the judgment. She reminded him that she had sought Yelp's assistance before initiating litigation, but was informed by Yelp that her only recourse was against Bird. However, after obtaining a judgment against Bird, it was now clear that the only remedy available to Hassell was to have Yelp take down the reviews. Ms. Hassell stated that if Yelp believed the injunction was too broad, she was "willing to discuss stipulating with you to terms pertaining to Yelp that would be more agreeable, for settlement purposes only, and before the motion to enforce the court's order is heard."

E. *Yelp's Motion to Set Aside the Judgment*

On May 23, 2014, Yelp filed a notice of motion and motion to set aside and vacate the Bird judgment pursuant to section 663 on the "grounds that the legal basis for the decision is not consistent with or supported by the facts or applicable law." In its supporting memorandum, Yelp alleged it had standing to bring the motion as an "aggrieved party," even though it was a nonparty in the action. Yelp then argued the trial court was required to vacate the Bird judgment because: (1) Hassell's failure to name Yelp as a party defendant violated Yelp's right to due process; (2) Yelp was immune from liability for posting Bird's reviews pursuant to the CDA, 47 United States Code section 230; (3) the judgment violated section 580 by awarding relief that Hassell did not request in their complaint; and (4) the judgment subverted Bird's First Amendment rights by suppressing speech that Hassell failed to prove was defamatory.

On July 8, 2014, the Honorable Ernest H. Goldsmith ordered Yelp's motion off calendar and directed Yelp to reschedule its motion in a different department of the superior court before Judge Sullivan, explaining: "The moving party seeks to vacate or modify Judge Sullivan's judgment and he should make the determination regarding the propriety of that request."

On July 23, 2014, Yelp filed a re-notice of its motion to vacate and set aside the Bird judgment. Yelp's re-notice did not reference section 663 or any other statutory ground for the motion, but explicitly relied on the memorandum and other pleadings Yelp had already filed in support of its motion to vacate. Furthermore, Yelp stated that its motion was being re-noticed in the same department as previously noticed, pursuant to the instruction of the presiding judge of the superior court.

On August 27, 2014, Judge Goldsmith held a hearing on Yelp's motion to vacate, accepted evidence, entertained arguments and then took the matter under submission. On September 29, 2014, the court filed an order denying Yelp's motion to set aside and vacate the judgment (the September 2014 order). The September 2014 order contains two sets of findings.

First, regarding the judgment itself, the court found that Judge Sullivan (1) conducted a court trial, (2) made a finding that Bird's postings about Hassell on Yelp.com were defamatory; (3) granted injunctive relief against Bird which required her to remove her defamatory reviews from Yelp.com; and (4) also ordered nonparty Yelp to remove the defamatory reviews. Judge Goldsmith then concluded that, under California law, an injunction can be "applied to" a nonparty by virtue of its relationship to an enjoined party. (Citing *Ross v. Superior Court* (1977) 19 Cal.3d 899, 906 (*Ross*).)

The second set of findings in the September 2014 order pertained to "Hassell's contention that Yelp is aiding and abetting Bird's violation of the injunction." The court found that the evidence showed that (1) Yelp highlighted Bird's defamatory reviews on Yelp.com by explicitly recommending one of her reviews, and also by refusing to take account of a "litany" of favorable reviews that users had posted when it calculated a "star rating" for the Hassell law firm; (2) Yelp's motion to vacate was not limited to its own interests, but sought to vacate the entire Bird judgment by making arguments that pertained only to the propriety of the judgment against Bird; and (3) Yelp refused to acknowledge or abide by a judicial finding that Bird's reviews are defamatory notwithstanding that its own terms of service require Yelp.com users to agree not to post a "fake or defamatory review. . . ." Based on these findings, the court concluded that

"Yelp is aiding and abetting the ongoing violation of the injunction and that Yelp has demonstrated a unity of interest with Bird."

III.

DISCUSSION

A. *Preliminary Considerations*

In its opening brief on appeal, Yelp requests that this court "reverse and vacate the trial court's judgment." Yelp appears to assume that the denial of its motion to vacate conferred standing on it to appeal the entire Bird judgment. At the same time, however, Yelp strenuously insists that it is not and never has been a "party" in this case. Adding to the confusion, Hassell contends that the trial court did not have "jurisdiction" to hear Yelp's section 663 motion, to which Yelp responds that courts have inherent power to set aside void judgments. To sort these issues and clarify the scope of this appeal, we begin by considering the two prerequisites for appellate standing.

"Standing to appeal is jurisdictional [citation] and the issue of whether a party has standing is a question of law [citation]." (*People v. Hernandez* (2009) 172 Cal.App.4th 715, 719.) To "have appellate standing, one must (1) be a party and (2) be aggrieved. [Citations.]" (*In re Marriage of Burwell* (2013) 221 Cal.App.4th 1, 12-13; see also § 902 ["Any party aggrieved may appeal in the cases prescribed in this title."].) "[A] nonparty that is aggrieved by a judgment or order may become a party of record and obtain a right to appeal by moving to vacate the judgment [citation]." (*People v. Hernandez*, at pp. 719-720.)

1. Yelp Is Not "Aggrieved" By the Judgment Against Bird, But Is "Aggrieved" By the Removal Order

"One is considered 'aggrieved' whose rights or interests are injuriously affected by the judgment. [Citations.] Appellant's interest ' "must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment." ' [Citation.]" (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737 (*Carleson*).)

Applying this test, we conclude that Yelp is not aggrieved by the default judgment against Bird. Awarding Hassell damages and injunctive relief with respect to Bird's

defamatory remarks did not cause Yelp to suffer a substantial immediate pecuniary injury of any kind. Bird was the party aggrieved by that judgment and she elected not to appeal. On the other hand, the judgment contains an additional provision which expressly requires Yelp to remove Bird's reviews from Yelp.com. This removal order directly affects the operation of Yelp's business and potentially carries some pecuniary consequence. Thus, Yelp was aggrieved by the removal order for purposes of establishing standing.

Throughout proceedings in the trial court and on appeal, Yelp has endeavored to blur the distinction between the judgment entered against Bird which awarded Hassell damages and injunctive relief, and the removal order in the judgment which directs Yelp to effectuate the injunction against Bird. For example, Yelp asserted trial court standing to bring a motion to vacate on the ground that "Yelp's rights and interests to maintain its Site as it deems appropriate [were] injuriously affected by the Judgment." However, this claimed injury did not result from the judgment itself, but only from the removal order requiring Yelp to effectuate the injunction against Bird. To the extent Yelp has ever meant to contend that an injunction requiring Bird to remove defamatory statements from the Internet injuriously affects Yelp, we disagree. Yelp's claimed interest in maintaining Web site as it deems appropriate does not include the right to second-guess a final court judgment which establishes that statements by a third party are defamatory and thus unprotected by the First Amendment.

Since Yelp was not aggrieved by the default judgment entered against Bird, it had no standing to challenge that judgment in the trial court. Thus, this court will not address arguments regarding the validity of the Bird judgment itself including, for example,

Yelp's theory regarding perceived defects in Hassell's complaint against Bird, and its contention that Hassell failed to prove their defamation claim against Bird.[4]

2. Yelp's Motion to Vacate Was Not Authorized by Section 663

As already noted, a legally aggrieved nonparty to a judgment or decree may "become a party of record and obtain a right to appeal by moving to vacate the judgment pursuant to Code of Civil Procedure section 663. [Citations.]" (*Carleson, supra*, 5 Cal.3d at p. 736.)

Section 663 states: "A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment: [¶] 1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected. [¶] 2. A judgment or decree not consistent with or not supported by the special verdict."

Section 663 "is designed to enable speedy rectification of a judgment rendered upon erroneous application of the law to facts which have been found by the court or jury or which are otherwise uncontroverted. [Citation.]" (*Forman v. Knapp Press* (1985) 173 Cal.App.3d 200, 203 (*Forman*).) Thus, " 'section 663 is a remedy to be used when a trial court draws incorrect conclusions of law or renders an erroneous judgment on the basis of uncontroverted evidence.' [Citation.]" (*Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 14 (*Plaza Hollister*); see also *Carleson, supra,* 5 Cal.3d at p. 738 [§ 663 motion is properly "made whenever the trial judge draws an

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[4] As noted, Bird elected not to appeal the judgment, but even if she had, Bird herself could not have challenged the sufficiency of the evidence to support the liability findings in the default judgment. (*Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1303.) Clearly then, Yelp's claimed injury from the removal order did not authorize its attempted challenge to the sufficiency of the evidence to support the judgment against Bird.

incorrect legal conclusion or renders an erroneous judgment upon the facts found by it to exist"].)

However, relief is available under section 663 only where a "different judgment" is compelled by the facts found by a judge or jury. (*Payne v. Rader* (2008) 167 Cal.App.4th 1569, 1574; *Plaza Hollister*, *supra*, 72 Cal.App.4th at p. 14.) In ruling on a section 663 motion, "the court cannot ' "in any way change any finding of fact." ' [Citation.]" (*Glen Hill Farm, LLC v. California Horse Racing Bd.* (2010) 189 Cal.App.4th 1296, 1302.) By the same token, section 663 does not authorize a challenge to the sufficiency of the evidence to support the judgment. (*Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 152-153.) Nor can the procedure be used to secure additional findings that were not made before judgment was entered. (*Mardesich v. C. J. Hendry Co.* (1942) 51 Cal.App.2d 567, 576.)

In the present case, Yelp used its motion to vacate to seek relief that was not available under section 663. First, Yelp requested that the entire judgment be vacated, not that it be corrected to conform to the findings of the trier of fact. Second, many of Yelp's arguments were direct or indirect challenges to the sufficiency of the evidence to support the Bird judgment. In addition to the fact that Yelp was not aggrieved by the default judgment against Bird, these claims were not cognizable in the context of a section 663 motion to vacate. Third, both Yelp and Hassell improperly used section 663 to seek additional findings of fact in order to resolve their collateral disagreement about whether Yelp became Bird's aider and abettor *after* the judgment was entered.

3. Yelp's Statutory Motion to Vacate Was Untimely

In addition to the substantive flaws discussed immediately above, Yelp's section 663 motion was not timely filed. Section 663a imposes time restrictions on a party's decision to file a motion to vacate a judgment under section 663, and on the trial court's authority to rule on such a motion. Two provisions of section 663a are pertinent here. First, subdivision (a) requires "[a] party" to file a notice of intent to file a section 663 motion within 15 days of the date it was served with notice of entry of judgment. Second, subdivision (b) states that "the power of the court to rule on a motion to set aside

and vacate a judgment shall expire 60 days . . . after service upon the moving party by any party of written notice of entry of the judgment . . . ." (§ 663a, subds. (a), (b).)

In the present case, Yelp's agent for service of process was served with the judgment on January 28, 2014. Yelp then waited 116 days before filing a notice of motion and motion to vacate the Bird judgment. Thus, Yelp not only failed to comply with the 15-day time limit for filing a notice of intent to file a motion to vacate, its tardy decision to bring the motion precluded the trial court from ruling on it within the statutory time period applicable to section 663 motions.

Yelp contends it was not subject to the time restrictions imposed by section 663a because it was not a party of record when the judgment was entered. (Citing *Aries Dev. Co. v. Cal. Coastal Zone Conservation Com.* (1975) 48 Cal.App.3d 534, 542 (*Aries*).) *Aries* was an appeal from a mandate judgment requiring the California Coastal Commission to issue a building permit. Before the commission filed its notice of appeal, an aggrieved neighbor filed a section 663 motion to vacate the judgment, which the trial court denied. On appeal, the respondent argued that the appellant-neighbor did not have standing because the commission filed its notice of appeal before the trial court ruled on the section 663 motion, thereby divesting the trial court of authority to do so. The *Aries* court disagreed, reasoning that the aggrieved neighbor became a party of record by filing its section 663 motion and its "right of appeal could not be destroyed by the fact that a subsequent event over which [it] had no control may have divested the court of jurisdiction to rule on the merits of the motion." (*Aries*, at p. 542.) More relevant to Yelp's appeal, the *Aries* court also rejected the respondent's related theory that the section 663 motion was untimely because it had not been filed "within the 15-day period prescribed by" section 663a. (*Aries*, at p. 542.) The court reasoned that the 15-day time limit only applies to "those who were parties of record when judgment was entered," and the appellant-neighbor did not become a party of record until he filed his motion to vacate. (*Ibid.*)

If applied without reflection, *Aries* supports Yelp's contention that it was not subject to the 15-day filing requirement in subdivision (a) of section 663a because it did

not become a "party" until it actually filed its motion to vacate. (*Aries*, *supra*, 48 Cal.App.3d at p. 542.) However, the procedural facts in *Aries* did not raise any substantive concern about the timeliness of the section 663 motion in that case, as it was filed before the commission filed a notice of appeal. (*Aries*, at p. 542.) Here, by contrast, Yelp filed its motion to vacate after the time for Bird to appeal the judgment had expired. Furthermore, by waiting more than 100 days after it was served with notice of entry of the judgment before filing its motion to vacate, Yelp precluded the trial court from complying with the 60-day outside time limit to rule on the motion as set out in section 663a, subdivision (b). We note too that this latter time limit provision was added to the statute in 2012, several years after *Aries* was decided. (See 2012 Amendment in Deering's Ann. Code Civil Proc. (2015 ed.) foll. § 663a under heading Amendments, p. 363.)

Unlike the 15-day filing rule in section 663a, subdivision (a), which expressly applies only to a "party," the time limitation in subdivision (b) restricts the "power of the court to rule" on a section 663 motion, and uses mandatory language to set an outside limit of 60 days from the date the moving party was served with written notice of entry of judgment. Strictly enforcing this 60-day limitation is consistent with the function of this specific type of statutory motion, which is to afford the decision maker a mechanism for the *speedy* rectification of an easily correctible error in the judgment. (See *Forman*, *supra*, 173 Cal.App.3d at p. 203.) Yelp does not cite any authority excepting it from the 60-day rule set forth in section 663a, subdivision (b).

Yelp takes the view that an aggrieved nonparty should be allowed to file any type of statutory motion to vacate a judgment within a reasonable time not exceeding six months from the entry of judgment. This argument ignores the authority of section 663a itself, and is based on an apparent misreading of *Plaza Hollister*, *supra*, 72 Cal.App.4th 1. The *Plaza Hollister* court held that the appellant in that case had filed an invalid section 663 motion in the trial court, but that it had appellate standing pursuant to a *nonstatutory* motion to vacate that was filed within a reasonable time after entry of

judgment. (*Plaza Hollister*, at p. 19.) *Plaza Hollister* reinforces our conclusion that, under the circumstances presented here, Yelp was not entitled to relief under section 663.

4. Yelp Acquired Standing By Filing a Nonstatutory Motion to Vacate

Like the motion at issue in *Plaza Hollister*, *supra*, 72 Cal.App.4th 1, Yelp's trial court motion to vacate was not based solely on section 663; Yelp also sought to invoke the court's inherent power to vacate a void judgment. Indeed, as discussed in our factual summary, Yelp's re-notice of its motion deleted any reference to section 663. Furthermore, Yelp's trial court pleadings repeatedly characterized the Bird judgment as void.

" 'A stranger to an action who is aggrieved by a void judgment may move to vacate the judgment, and on denial of the motion may have the validity of the judgment reviewed upon an appeal from the order denying the motion. [Citations.]' [Citation.] . . . It has also been said: '[A] stranger may attack a void judgment if some right or interest in him would be affected by its enforcement. [Citations.]' [Citation.]" (*Plaza Hollister*, *supra*, 72 Cal.App.4th at pp. 15-16.) Furthermore, the "granting of relief, which a court under no circumstances has any authority to grant, has been considered an aspect of fundamental jurisdiction for the purposes of declaring a judgment or order void." (*Id.* at p. 20; see *Selma Auto Mall II v. Appellate Department* (1996) 44 Cal.App.4th 1672, 1683 ["When a court grants relief which it has no authority to grant, its judgment is to that extent void."].)

This type of nonstatutory motion was the correct mechanism for Yelp to employ to challenge a portion of the Bird judgment on the ground that it contains an allegedly void removal order. Furthermore, treating Yelp's motion as a nonstatutory motion eliminates Hassell's concerns about its timeliness. " '[A] judgment or order, which is in fact void for want of jurisdiction, but the invalidity of which does not appear from the judgment-roll or record, may be set aside on motion within a reasonable time after its entry, not exceeding the [six month] time limit prescribed by [former] section 473 of the Code of Civil Procedure; and an independent suit in equity to set aside the judgment or order is

not necessary. [Citations.]' " (*Plaza Hollister, supra*, 72 Cal.App.4th at p. 19.) Here, Hassell argues that Yelp's motion was not filed within a reasonable time, but the record does not compel that conclusion.

The considerations outlined above lead to the following conclusions regarding Yelp's standing to appeal: Yelp is aggrieved by the removal order directing Yelp to remove Bird's defamatory reviews from Yelp.com; Yelp became a party of record in this case by filing a nonstatutory motion to vacate the allegedly void order within a reasonable time after entry of the judgment; and, therefore, Yelp has standing to appeal the removal order provision contained in the Bird judgment.

The substantive issue raised by this appeal is whether the trial court had the legal authority to make the removal order directing Yelp to remove Bird's defamatory reviews from Yelp.com. Yelp contends that Judge Sullivan did not have that authority because the removal order (1) violates due process; (2) constitutes a prior restraint of speech; and (3) is barred by the CDA. Before considering these claims of legal error, we briefly address two circumstances that are mentioned above in order to further clarify the scope of our review.

First, Yelp attempts to characterize the removal order as an injunction against Yelp. We do not accept that characterization. The judgment was entered solely against Bird, and the injunctive order was directed solely at Bird's defamatory speech.[5] The removal order was limited to statements covered by that injunction, statements attributed to Bird which she had been ordered to remove. Thus, the removal order does not impose any independent restraint on Yelp's autonomy. Under these circumstances, charactering the removal order as an injunction creates unnecessary confusion about the clear distinction between the removal order and the underlying injunction against Bird. For reasons already discussed, Yelp cannot bootstrap its collateral attack of an allegedly void

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[5] "[O]nce a court has found that a specific pattern of speech is unlawful, an injunctive order prohibiting the repetition, perpetuation, or continuation of that practice is not a prohibited 'prior restraint' of speech. [Citation.]" (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 140.)

order into a substantive appeal of the default judgment itself. The question whether the trial court should have granted an injunction against Bird is outside the scope of this appeal.

Second, the September 2014 order denying Yelp's motion to vacate the judgment contains findings and a conclusion responsive to Hassell's contention that Yelp was aiding and abetting Bird's violation of the judgment. However, it appears that neither the trial court nor the parties ever considered whether that issue was cognizable in the context of a motion to vacate a judgment. As we have explained, the only issue properly raised by Yelp's nonstatutory motion to vacate was whether Judge Sullivan was without power to make the removal order that implemented the injunction against Bird. What Yelp did after the judgment was entered—whether it became an aider and abettor with respect to Bird's postjudgment violation of the injunction—is a separate issue which may be relevant in a future contempt action against Yelp for disobedience of the judgment. But Judge Goldsmith's adjudication of that issue was premature, and was also potentially improper to the extent proceedings were conducted without the procedural safeguards attendant to a contempt proceeding. In any event, findings of fact regarding Yelp's aiding and abetting are irrelevant to the issues properly raised in this appeal. Therefore, those findings will have no bearing on our disposition of this appeal.

B. *Due Process*

Yelp contends that the removal order was barred by due process because the trial court did not afford Yelp notice or a hearing before the order was entered. There are two distinct prongs to Yelp's due process theory: first, that the trial court could not order Yelp to implement the injunction because it was not a party in the defamation action; and second, that prior notice and a hearing were mandatory because the removal order impinged on Yelp's First Amendment right to "host" Bird's reviews.

1. An Injunction Can Run Against a Nonparty

" ' " 'An injunction is obviously a personal decree. It operates on the person of the defendant by commanding him to do or desist from certain action.' " [Citation.]' [Citation.] Indeed it may 'deprive the enjoined parties of rights others enjoy precisely

because the enjoined parties have abused those rights in the past.' [Citation.] Thus, it is well established that 'injunctions are not effective against the world at large. [Citations.]' [Citations.] On the other hand, the law recognizes that enjoined parties 'may not nullify an injunctive decree by carrying out prohibited acts with or through nonparties to the original proceeding. [Citations.]' [Citation.] Thus, an injunction can properly run to classes of persons with or through whom the enjoined party may act. [Citations.] However, 'a theory of disobedience of the injunction cannot be predicated on the act of a person not in any way included in its terms or acting in concert with the enjoined party and in support of his claims.' [Citations.]" ' " (*Planned Parenthood Golden Gate v. Garibaldi* (2003) 107 Cal.App.4th 345, 352-353; see also *People v. Conrad* (1997) 55 Cal.App.4th 896, 902; *In re Berry* (1968) 68 Cal.2d 137, 155-156; *Berger v. Superior Court* (1917) 175 Cal. 719, 721.)

These settled principles undermine Yelp's theory that the trial court was without any authority to include a provision in the Bird judgment which ordered Yelp to effectuate the injunction against Bird by deleting her defamatory reviews. As Judge Goldsmith observed in the order denying Yelp's motion to vacate, our Supreme Court has explicitly confirmed that injunctions can be applied to nonparties in appropriate circumstances. (*Ross*, *supra*, 19 Cal.3d at p. 906.) " 'In matters of injunction . . . it has been a common practice to make the injunction run also to classes of persons through whom the enjoined person may act, such as agents, servants, employees, aiders, abettors, etc., though not parties to the action, and this practice has always been upheld by the courts, and any of such parties violating its terms with notice thereof are held guilty of contempt for disobedience of the judgment." (*Ibid.*)

Yelp contends that the rule permitting a court to enforce an injunction against a nonparty is limited to situations in which "a group or organization has been enjoined, so as to prevent the group's individual members who are not named in the injunction from acting on behalf of that group." As support for this claimed limitation, Yelp cites *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090 (*Acuna*). The issue in *Acuna* was whether designated members of a criminal street gang who were named defendants in a public

nuisance action could be subject to an injunction because of the documented activities of the group to which they belonged. In approving such an injunction, the *Acuna* court did not impose any restriction on a court's authority to issue an injunction which runs also to a nonparty. Nor did it even consider that question.

Yelp cites two additional cases to support its contention that the trial court could not order a nonparty to effectuate the injunction against Bird: *Fazzi v. Peters* (1968) 68 Cal.2d 590 (*Fazzi*) and *Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th 110, 120-121 (*Tokio Marine*).

Fazzi, *supra*, 68 Cal.2d at page 591, was a damages action against a partnership. The appellant was an alleged partner who had been served with process but had not been made a party to the underlying action against the partnership. Neither the appellant, nor his alleged copartner, nor the partnership appeared in the action, and a judgment of default was entered holding each of them individually and doing business as a copartnership jointly and severally liable for money damages in the approximate amount of $49,000. (*Id.* at p. 592.) The *Fazzi* court reversed the default judgment against the appellant, applying " 'the general rule that a judgment may not be entered either for or against a person who is not a party to the proceeding, and any judgment which does so is void to that extent.' [Citations.]" (*Id.* at pp. 594-595, 598.)

Tokio Marine, *supra*, 75 Cal.App.4th 110, involved a lawsuit to determine fault for a fire as between a general contractor and a roofing contractor. (*Id.* at p. 119.) After judgment was entered in favor of the roofing contractor, the trial court summarily granted the roofing contractor's motion to amend the judgment to add the general contractor's insurer as an additional judgment debtor. On appeal, the *Tokio Marine* court reversed the judgment against the insurer, finding that the insurer was not a party in the action or an alter ego of the original defendant. Furthermore, the court found that the summary addition of the insurer as an additional judgment debtor violated due process. (*Id.* at pp. 120-121.)

Fazzi and *Tokio Marine* are inapposite because both cases involved money judgments that were entered against nonparties to the litigation. Here, by contrast, the

damages portion of the judgment was entered solely against Bird. Neither *Fazzi* nor *Tokio Marine* address whether an injunction imposed against a party can be enforced against a nonparty.

Yelp argues in the alternative that, even if the injunction against Bird could properly be enforced against a nonparty like Yelp, the evidence in this case does not "support the theory that Yelp was somehow 'aiding and abetting' Bird's violation of the injunction." This issue was a major dispute below. But as we have already discussed, it has no bearing on the question whether the trial court was without power to issue the removal order in the first instance. The authority summarized above establishes that a trial court does have the power to fashion an injunctive decree so that the enjoined party may not nullify it by carrying out the prohibited acts with or through a nonparty to the original proceeding.

2. Yelp's First Amendment Rights

Yelp's second due process theory is that the First Amendment protects Yelp's right "to distribute the speech of others without an injunction," and "Yelp simply cannot be denied those rights without notice of the proceedings and an opportunity to be heard." To support this argument, Yelp cites *Marcus v. Search Warrants.* (1961) 367 U.S. 717 (*Marcus*).

In *Marcus*, *supra*, 367 U.S. 717, wholesale distributors of books and magazines alleged that Missouri's procedure for seizing allegedly obscene publications had been applied to them in a manner which violated their due process rights. The evidence in that case showed that a police officer filed complaints stating that each appellant kept "obscene" publications for sale; a circuit judge conducted an ex parte hearing on the complaints; and, without reviewing the allegedly obscene material, the judge issued warrants authorizing any officer in the state to search for and seize obscene materials from appellants' premises. The warrants were subsequently executed by different officers who seized all publications which, in their judgment, were obscene. Thirteen days later, appellants were afforded hearings on their motions to quash the search warrants, suppress evidence, and return their property. More than two months after the

materials were seized, the circuit judge issued an opinion finding that 180 of the 280 seized items were not obscene and were to be returned to appellants. (*Id.* at pp. 723-724.)

The United States Supreme Court held that, as applied to the *Marcus* appellants, Missouri's procedure lacked due process safeguards to assure that non-obscene materials were afforded First Amendment protection. (*Marcus*, *supra*, 367 U.S. at p. 731.) "Putting to one side" the fact that appellants were not afforded an opportunity to challenge the complaints filed against them prior to execution of the warrants, the court highlighted several flaws in the Missouri procedure, including that the judge issued a warrant based on cursory allegations of a single officer without actually reviewing any of the allegedly obscene material; the warrants gave officers broad discretion to use individual judgment to determine what material was obscene; the officers were provided with no "guide to the exercise of informed discretion"; and two-thirds of the seized publications which were not obscene were withheld from the market for over two months. (*Id.* at pp. 731-733.) These circumstances demonstrated that Missouri's procedure lacked sufficient safeguards to justify conferring discretion on law enforcement to seize allegedly obscene materials: "Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantees." (*Id.* at p. 733, fn. omitted.)

We disagree that *Marcus*, *supra*, 367 U.S. 717 supports Yelp's due process claim for several reasons. First, Yelp's factual position in this case is unlike that of the *Marcus* appellants, who personally engaged in protected speech activities by selling books, magazines and newspapers. In order to claim a First Amendment stake in this case, Yelp characterizes itself as a publisher or distributor. But, at other times Yelp portrays itself as more akin to an Internet bulletin board—a host to speakers, but in no way a speaker itself. Of course, Yelp may play different roles depending on the context. However, in this context it appears to us that the removal order does not treat Yelp as a publisher of Bird's speech, but rather as the administrator of the forum that Bird utilized to publish her defamatory reviews.

Second, even if Yelp's operation of an interactive website is construed as constitutionally protected speech by a distributor, *Marcus* does not support Yelp's broad notion that a distributor of third party speech has an unqualified due process right to notice and a hearing before distribution of that speech can be enjoined. In *Marcus*, the use of an ex parte hearing to secure search warrants was only one of many problems with the Missouri procedure which culminated in the ruling that appellants' due process rights were violated. (*Marcus*, *supra*, 367 U.S. at pp. 731-733.) Indeed, in a subsequent case in which *Marcus* was distinguished, the Supreme Court clarified that "[t]his Court has never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. [Citations.]" (*Heller v. New York* (1973) 413 U.S. 483, 488.)

Third, and crucially, the due process problems explored in *Marcus*, *supra*, 367 U.S. 717, and its progeny pertain to attempts to suppress speech that is only *suspected* of being unlawful. Here, we address the very different situation in which specific speech has already been found to be defamatory in a judicial proceeding. Yelp does not cite any authority which confers a constitutional right to a prior hearing before a distributor can be ordered to comply with an injunction that precludes re-publication of specific third party speech that has already been adjudged to be unprotected and tortious.

C. *The Constitutional Bar Against Prior Restraints*

Yelp also contends the trial court was without authority to issue the removal order because it constitutes a prior restraint of speech.

1. Applicable Law

"An order prohibiting a party from making or publishing false statements is a classic type of an unconstitutional prior restraint. [Citation.] 'While [a party may be] held responsible for abusing his right to speak freely in a subsequent tort action, he has the initial right to speak freely without censorship.' [Citation.]" (*Evans v. Evans* (2008) 162 Cal.App.4th 1157, 1167-1168.) However, the constitutional bar against prior restraint of speech "does not apply to an order issued after a trial prohibiting the defendant from repeating specific statements found at trial to be defamatory. . . ." (*Id.* at

p. 1168, citing *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1155-1156, italics omitted (*Balboa Island*).)

In *Balboa Island*, *supra*, 40 Cal.4th 1141, a restaurant owner filed a defamation action against a vocal critic of the restaurant. After a bench trial, the court issued a permanent injunction which enjoined the defendant from engaging in various activities including repeating specifically identified defamatory statements about the plaintiff to third parties. (*Id.* at pp. 1145-1146.) The California Supreme Court held that the injunction was overbroad in some respects, but that "a properly limited injunction prohibiting [the] defendant from repeating to third persons statements about the [restaurant] that were determined at trial to be defamatory would not violate [the] defendant's right to free speech." (*Id.* at p. 1146.)

The *Balboa Island* court began with the foundational premise that freedom of speech is a fundamental right protected against invasion by state action by both the First and Fourteenth Amendments. (*Balboa Island*, *supra*, 40 Cal.4th at p. 1147.) But the court also recognized that this right is not absolute: " '[T]here are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend because they "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." [Citation.] [¶] Libelous speech has been held to constitute one such category, [citation] . . . .' [Citations.]" (*Ibid.*)

Because defamation is not protected by the First Amendment, the *Balboa Island* court concluded, "an injunction issued following a trial that determined that the defendant defamed the plaintiff that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment." (*Balboa Island*, 40 Cal.4th at p. 1148.) As the court explained, an injunction that is entered following a determination at trial that the enjoined statements are defamatory does not constitute a prohibited prior restraint of expression because " '[o]nce specific expressional acts are properly determined to be unprotected by the [F]irst [A]mendment,

there can be no objection to their subsequent suppression or prosecution.' [Citations.]" (*Id.* at pp. 1155-1156.)

2. Analysis

The removal order directed at Yelp states: "Yelp.com is ordered to remove all reviews posted by AVA BIRD under user names 'Birdseye B.' and 'J.D.' attached hereto as Exhibit A and any subsequent comments of these reviewers within 7 business days of the date of the court's order."

Under the authority of *Balboa Island*, *supra*, 40 Cal.4th at pages 1155-1156, the trial court had the power to make the part of this order requiring Yelp to remove the three specific statements that were set forth in the exhibit A attachment to the Bird judgment because the injunction prohibiting Bird from repeating those statements was issued following a determination at trial that those statements are defamatory. However, to the extent the trial court additionally ordered Yelp to remove subsequent comments that Bird or anyone else might post, the removal order is an overbroad prior restraint on speech. (*Ibid.*; see also *Evans*, *supra*, 162 Cal.App.4th at p. 1169 [preliminary injunction prohibiting appellant from publishing any "false and defamatory" statements on the Internet constitutionally invalid because there had been no trial and determination on the merits that any statement by appellant was defamatory].) Therefore, we will remand this matter to the trial court with directions that it modify the removal order consistent with this limitation.

Yelp contends that limiting the scope of the removal order to statements that have already been adjudged as defamatory does not cure the constitutional problem because the findings that Bird's reviews of Hassell were defamatory were not made by a jury. According to Yelp, "the Supreme Court in *Balboa Island* carefully limited its narrow holding to judgments entered *after a jury trial* . . . ." (Original italics.) We find nothing in *Balboa Island* supportive of this contention. In fact, the injunction in that case was issued after a bench trial. (*Balboa Island*, *supra*, 40 Cal.4th at p. 1144.)

Yelp argues that even if *Balboa Island* applies in this context, the removal order is impermissibly overbroad because Hassell failed to actually prove that Bird wrote the

February 2013 review posted under the name "J.D. Alameda, CA," or the April 2013 review posted under the name "Birdseye B. Los Angeles, CA." However, the trial court made a final judicial determination that Bird posted those reviews and, for reasons we have already discussed, Yelp does not have standing to challenge that aspect of the judgment.

D. *Yelp's Immunity from Tort Liability*

Finally, Yelp contends that the removal order is barred by section 230 of the CDA, 47 United States Code section 230 (section 230). According to Yelp, section 230 prohibits courts "from ordering website providers like Yelp to remove content provided by third parties."

1. Applicable Law

Section 230 states, in pertinent part: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (§ 230(c)(1).) "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." (§ 230(e)(3).)

Section 230 was enacted as an amendment to the CDA. Originally, the primary objective of the CDA was to restrict the exposure of minors to indecent materials on the Internet. However, through the addition of section 230, the CDA acquired a second objective of furthering First Amendment and e-commerce interests on the Internet. (*Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1027-1028.)

Accordingly, section 230 has been construed broadly to immunize "providers of interactive computer services against liability arising from content created by third parties." (*Fair Housing Coun., San Fernando v. Roomamates.com* (9th Cir 2008) 521 F.3d 1157, 1162, fn. omitted; see also *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.* (N.D.Cal. 2015) 2015 U.S. Dist. LEXIS 154716.) As elucidated in a leading decision by the Fourth Circuit, section 230 also "precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—

such as deciding whether to publish, withdraw, postpone or alter content—are barred." (*Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 330 (*Zeran*).)

The justification for this broad grant of immunity is that it (1) encourages Internet service providers to self-regulate the dissemination of offensive material over their services, and (2) avoids a chilling effect on Internet free speech that would result from exposing companies to tort liability for potentially harmful messages they do not create but that are delivered by using their service. (*Zeran*, *supra*, 129 F.3d at p. 331.)

California courts have also construed section 230 to afford interactive service providers broad immunity from tort liability for third party speech. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33 (*Barrett*); *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 802-804 (*Delfino*); *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 830; *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684 (*Kathleen R.*).)

In *Barrett*, *supra*, 40 Cal.4th 33, our state Supreme Court followed *Zeran* and its progeny. Concluding that section 230 confers "broad immunity against defamation liability for those who use the Internet to publish information that originated from another source," the *Barrett* court held that the statute "prohibits 'distributor' liability for Internet publications." (*Barrett*, at pp. 39-40.) The court expressed concern about the "disturbing implications" of the "prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet." (*Id.* at p. 63.) However, the court observed that, "[a]t some point, active involvement in the creation of a defamatory Internet posting would expose a defendant to liability as an original source." (*Id.* at p. 60, fn. 19.) Aside from that limitation, the court reasoned that applying section 230 to exempt Internet intermediaries from defamation liability for republication furthers congressional intent and that any expansion of tort liability beyond the originator of the defamatory Internet publication "must await congressional action." (*Id.* at p. 63.)

Thus, "[t]here are three essential elements that a defendant must establish in order to claim section 230 immunity" from California tort liability. (*Delfino*, *supra*, 145 Cal.App.4th at pp. 804.) "They are '(1) the defendant [is] a provider or user of an interactive computer service; (2) the cause of action treat[s] the defendant as a publisher

or speaker of information; and (3) the information at issue [is] provided by another information content provider.' [Citation.]" (*Id.* at p. 805.)

2. Analysis

Yelp argues the authority summarized above establishes that the removal order is void. We disagree. The removal order does not violate section 230 because it does not impose any liability on Yelp. In this defamation action, Hassell filed their complaint against Bird, not Yelp; obtained a default judgment against Bird, not Yelp; and was awarded damages and injunctive relief against Bird, not Yelp.

These circumstances distinguish the present case from Yelp's authority, all cases in which causes of action or lawsuits against internet service providers were dismissed pursuant to section 230. (See, e.g., *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1098 [CDA "protects an internet service provider from suit" for failing to remove material from its Web site that was harmful to the plaintiff]; *Carafano v. Metrosplash.com. Inc.* (9th Cir. 2003) 339 F.3d 1119, 1125 ["despite the serious and utterly deplorable consequences that occurred in this case, we conclude that Congress intended that service providers such as Matchmaker be afforded immunity from suit']; *Goddard v. Google, Inc.* (N.D.Cal. 2009) 640 F.Supp.2d 1193 [dismissing complaint against Internet service provider for allegedly fraudulent advertisement that appeared on its Web site]; *Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561 [sustaining demurrer to causes of action for negligence and strict liability against social networking Web site arising out of sexual assaults inflicted on minors who met their assailants on the site]; *Hupp v. Freedom Communications, Inc.* (2013) 221 Cal.App.4th 398 [affirming order granting anti-SLAPP motion to strike claim that the defendant breached its Internet Web site user agreement]; *Delfino, supra*, 145 Cal.App.4th 790 [affirming summary judgment in favor of employer that provided interactive computer service to employee who used the system to make threats over the Internet].)

Neither party cites any authority that applies section 230 to restrict a court from directing an Internet service provider to comply with a judgment which enjoins the originator of defamatory statements posted on the service provider's Web site. We note,

however, that section 230 explicitly provides that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." (§ 230(e)(3).) As discussed above, California law authorizes a trial court to issue an injunction preventing the repetition of statements that have been adjudged to be defamatory by the trier of fact. (*Balboa Island*, *supra*, 40 Cal.4th at p. 1160.) California law also empowers the court to enforce its judgment by ordering that an injunction run to a non-party through whom the enjoined party may act. (*Planned Parenthood*, *supra*, 107 Cal.App.4th at pp. 352-353.) It appears to us that these state law procedures are not inconsistent with section 230 because they do not impose any liability on Yelp, either as a speaker or a publisher of third party speech.

Yelp mistakenly contends that the "trial court" imposed liability on Yelp as an aider and abettor of Bird's defamatory postings. The "trial court" that conducted the default prove-up hearing and entered judgment against Bird alone (Judge Sullivan) did not find that Yelp was an aider and abettor or impose any liability on Yelp whatsoever. Furthermore, although the trial court that conducted the hearing on Yelp's motion to vacate (Judge Goldsmith) found that Yelp was an aider and abettor, we have already declared this finding not relevant to the issues before this court, and reiterate that it has no bearing on our analysis.

Yelp also argues that "enjoining a party from publishing content is a remedy that can only follow from a finding of liability, and thus the injunction entered against Yelp cannot survive the robust protection of the CDA." Again though, the party that was enjoined from publishing content in this case was Bird, and that injunction did follow a finding of Bird's liability for publishing defamatory reviews about Hassell. Assuming, as Yelp has maintained, that Yelp played no role in the creation of that defamatory speech, an order directing Yelp to remove only those reviews that are covered by the injunction does not impose any liability on Yelp.

Yelp insists that "Section 230 immunity encompasses claims for injunctive relief, and the cases do not distinguish between defendants and non-parties." However, each case cited for this proposition involved a failed claim for injunctive relief that was alleged

against an Internet service provider defendant in a civil lawsuit. (*Kathleen R., supra*, 87 Cal.App.4th 684; *Noah v. AOL Time Warner, Inc.* (E.D.Va. 2003) 261 F.Supp.2d 532; *Smith v. Intercosmos Media Group* (E.D.La. 2002) 2002 U.S. Dist. LEXIS 24251; see also *Medytox Solutions, Inc. v. Investorshub.com, Inc.* (Fla. 2014) 152 So.3d 727.)

Yelp argues that cases extending CDA immunity to claims for injunctive relief that are alleged directly against a interactive service provider in a tort action must apply with equal force to an injunction that binds a non-party. Otherwise, Yelp argues, "a plaintiff who wants to enjoin an interactive computer service can nullify its immunity under the CDA by suing the creator of the third-party content and then obtaining an injunction binding the interactive computer service . . . ." This argument ignores the fact that protection against third party liability is the foundation of CDA immunity. As we have pointed out, Hassell did not allege any cause of action seeking to hold Yelp liable for Bird's tort. The removal order simply sought to control the perpetuation of judicially declared defamatory statements. For this reason, Yelp seriously understates the significance of the fact that Hassell obtained a judgment which establishes that three reviews Bird posted on Yelp.com are defamatory as a matter of law, and which includes an injunction enjoining Bird from repeating those three reviews on Yelp.com. Indeed, that injunction is a key distinction between this case and the CDA cases that Yelp has cited, all of which involved *allegations* of defamatory conduct by a third party, and not a judicial determination that defamatory statements had, in fact, been made by such third party on the Internet service provider's Web site.

Finally, Yelp contends that section 230 bars "any liability for failing to comply with the injunction." Once again, Yelp's imprecision masks the real question. If an injunction is itself a form of liability, that liability was imposed on Bird, not Yelp. Violating the injunction or the removal order associated with it could potentially trigger a different type of liability which implicates the contempt power of the court. Generally speaking, "a nonparty to an injunction is subject to the contempt power of the court when, with knowledge of the injunction, the nonparty violates its terms with or for those who are restrained." (*People v. Conrad, supra,* 55 Cal.App.4th at p. 903, italics omitted.)

Yelp does not cite any authority which addresses the question whether section 230 would immunize Yelp from being sanctioned for contempt. In our opinion, sanctioning Yelp for violating a court order would not implicate section 230 at all; it would not impose liability on Yelp as a publisher or distributor of third party content. A "contempt proceeding is not a civil action but is of a criminal nature even though its purpose is to impose punishment for violation of an order made in a civil action. [Citation.]" (*Freeman v. Superior Court* (1955) 44 Cal.2d 533, 536.) The cases we have found in which Internet service providers were named in contempt proceedings are consistent with this conclusion. (See, e.g., *Blockowicz v. Williams* (7th Cir. 2010) 630 F.3d 563; *Arista Records, LLC v. Vita Tkach* (S.D.N.Y. 2015) 2015 U.S. Dist. LEXIS 107339.)

For all of these reasons, Yelp has failed to establish that section 230 or any other law barred the trial court from issuing the removal order under the circumstances of this case. Therefore, Yelp's nonstatutory motion to vacate the Bird judgment was properly denied.

IV.

DISPOSITION

The September 2014 order denying Yelp's motion to vacate the Bird judgment is affirmed, but this case is remanded to the trial court with the direction to narrow the terms of the removal order in the January 2014 judgment by limiting it to the specific defamatory statements that were listed on exhibit A of that judgment. The parties are to bear their own costs of appeal.

RUVOLO, P. J.

We concur:

RIVERA, J.

STREETER, J.

Trial Court:	San Francisco Superior Court
Trial Judge:	Hon. Donald J. Sullivan
Counsel for Appellant:	David Wright Tremaine, Thomas R. Burke and Deborah A. Adler
Counsel for Respondents:	Duckworth Peters Lebowitz Olivier, Monique Olivier

PROOF OF SERVICE

I, Mary Land, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of Davis Wright Tremaine LLP, 505 Montgomery Street, Suite 800, San Francisco, CA 94111-6533.

I caused to be served a true and correct copy of **PETITION FOR REVIEW** on each person on the attached list by the following means:

☒ **On July 18, 2016, I enclosed a true and correct copy of said document in an envelope with postage fully prepaid for deposit in the United States Postal Service.**

I placed such envelope(s) with postage thereon fully prepaid for deposit in the United States Mail in accordance with the office practice of Davis Wright Tremaine LLP, for collecting and processing correspondence for mailing with the United States Postal Service.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on July 18, 2016 at San Francisco, California.

Mary Land

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